Supreme Court, U.S.
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85-1115 (1)

In The

Supreme Court of the United States

October Term 1985

No.

SHEILA MOATS

Petitioner

v.

CHARLES WICK, Director,
United States Information Agency,
et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

SHEILA A. MOATS
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Pro Se

Questions Presented

(1) Did the District Court and the Court of Appeals err in failing to recognize that petitioner passed a translation and voice test for a position as International Broadcaster administered by the Burmese Service of the Voice of America, thus establishing a prima facie case of discrimination in employment practices.

(2) Is an agency of the United States Government exempt from the provisions of the federal civil rights acts with regard to equal employment opportunity for minorities and women in the federal government?

(3) Is the testimony of experts from the United States Government so absolute that it cannot be challenged by outside expert witnesses?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Sheila Moats, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on September 5, 1985, affirming the judgment

of the United States District Court for the District of Columbia delivered from the bench on July 5, 1984. Timely petition for rehearing was denied on November 5, 1985.

CITATIONS TO THE RECORD AND OPINIONS BELOW

The judgment of the District Court was delivered from the bench, is unreported, and is quoted from the trial transcript (tr. 157-158)(Appendix A). The opinion of the United States Court of Appeals for the District of Columbia Circuit which was delivered per curiam and is unreported appears in Appendix B. The denial of the Petition for Rehearing was unreported and is reproduced in Appendix C.

Jurisdiction

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964 as amended in 1972 (42 USCS, 2000e et seq).

The order of the District of Columbia Court of Appeals was entered on September 5, 1985 affirming the District Court judgment. A petition for rehearing was denied on November 5, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1) and Rule 19 of the Supreme Court of the United States.

Statement of the Case

In 1978, the United States Information Agency published an announcement of vacancies for Foreign Language Broadcasters (GS-5-11) in various languages including Burmese for the Voice of America (hereafter referred to as V.O.A.). Plaintiff applied for and took a voice and translation test for such a position with V.O.A.'s Burmese Service. The scoring sheets obtained from the personnel office of the United States Information Agency (and entered as exhibits in the trial) showed that two of three examiners passed plaintiff on the translation test and all three passed her on the voice test, all at the marginal or "just acceptable" level. The examiner who failed to pass the plaintiff on the translation test was asked at what level he graded it and he answered "I think it was a GS-9 level." (tr. 121) Since it is contrary to federal statute (29 CFR, 1607.49(c)(1)) to grade a test at higher than

entrance level, his grade must be disregarded. Testimony at the trial by defendant's witnesses established that the United States Information Agency was required to hire United States citizens who passed a test at the marginal level at a GS-5 grade. Shortly after plaintiff took her test, a male United States citizen who, according to testimony by defendants, passed at the marginal level after several attempts, was hired at a GS-5 grade. Evidence showed that this male candidate was routinely promoted to a journeyman level. The V.O.A. was unable to produce evidence in court that this man ever passed a test. However, plaintiff, who is also a United States citizen, was not hired although she passed at the first attempt. She was instead erroneously notified that she did not pass the test.

After receiving a failing notice, plaintiff took a second test. This test was not

ready when she arrived at the scheduled time to take it. Exhibits show that the second test was twice as long as the first although the time allowed was the same. The chief of the Burmese Service admitted at the trial that the second test was a bunch of papers put together and that it was an atypical test. This test clearly violated statutory requirements for uniformity in testing procedures (29 CFR, 1607.5(6)(2), Comment, Employment Testing Under Title VII of the Civil Rights Act of 1964, 12 BC Ind & Com L Rev 268, Comment, Employee Testing, 7 Wake Forest L Rev 425, EEOC Decision No 71-1155, CCH EEOC Decisions, 6209) and the mere administration of such an irregular test was therefore a violation of plaintiff's civil rights.

The results of the second test should therefore have been disregarded since (1) plaintiff had already passed one test and (2) the second test clearly violated statutory requirements for uniformity in testing.

Plaintiff's trial attorney erred in not moving to disqualify this test. Defendant's attorney built her case on this atypical test.

Testimony also showed that at the time only one of eight employees of the Burmese Service was a female, thus establishing prima facie evidence of a pattern of discrimination in hiring. (Rodriguez v. East Texas Motor Freight (CA 5 Tex) 505 F 2d 40, reh den(CA 5 Tex) 518 F 2d 1407) It was also shown that the Burmese Service did not practice affirmative action in seeking female employees although the United States Information Agency had an affirmative action plan in effect at the time.

Plaintiff's trial attorney introduced an outside expert witness to corroborate her ability to translate from English into Burmese. The court objected to his testifying regarding tests plaintiff took on the grounds that such testimony would constitute "regrading" or

"second-guessing". The trial court, however, permitted expert testimony on behalf of defendants by two employees of the Burmese Service who were also plaintiff's examiners on her first test. Thus, defendant's witnesses were permitted to testify uncontradicted. One of these Government witnesses had already passed plaintiff and the other was the one who misgraded her at a level higher than the lowest grade called for in the announcement. The trial court erred in excluding the opinion of plaintiff's expert on a critical issue while allowing the opinion of the adversary's experts on the same issue.

> "(Rule 403) may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue."

United States v. Sellars, 566 F. 2d 884, 886 (4th Cir., 1977)

The trial court decided against plaintiff in a ruling from the bench (Appendix A). The

ruling by the trial court disregarded evidence that plaintiff passed a test and stated that plaintiff did not meet at least one of the criteria established in McDonnell Douglas (McDonnell Douglas Corp v. Green 411 U. S. 792, 93 S. Ct. 1817, 36 L Ed. 2d 668). The trial court is clearly in error since (i) plaintiff is a female; (ii) plaintiff applied and passed a test; (iii) plaintiff was rejected; (iv) the employer continued to seek applicants as evidenced by the fact that a male applicant alleged to have similar qualifications was hired shortly after plaintiff was rejected. Thus, plaintiff established a prima facie case of discrimination because of sex.

The ruling of the Court of Appeals (Appendix B) essentially affirmed the ruling of the District Court with regard to the exclusion of appellant's expert witness in an order filed September 5, 1985. A timely petition for rehearing was denied on November 5, 1985. (Appendix C)

Appellee's attorney responded to appellant's brief in the appeal with a motion for Summary Affirmance. This motion contained many untrue and misleading allegations. Appellant's attorney erred in not clearly refuting these unfounded allegations of facts. Appellant, acting as her own counsel, petitioned the court for a rehearing. In this petition, she categorically refuted, with evidence from the trial record, untrue and misleading allegations of fact from appellee's motion for Summary Affirmance. Her petition was, however, denied.

Reasons for granting the Writ

The Writ should be granted because it is important to establish that an agency of the United States Government cannot flagrantly disregard federal statutes (42 USCS, 2000e-16) with regard to equal employment oppor-

tunities for women in the United States Government. It is also important to establish that the use of illegal testing procedures to exclude female applicants will not be condoned. To ignore this violation of petitioner's civil rights would make a mockery of the law and establish a precedent that an agency of the United States Government is not bound to adhere to the provisions of the law if it does not wish to do so.

A second issue is whether the trial judge in District Court abused his discretion when he excluded testimony by plaintiff's expert witness. The discretion of the trial court with regard to admission of expert witnesses, while broad, is clearly not unlimited. The case, which revolved around plaintiff's ability to translate English into Burmese, clearly required testimony of expert witnesses to advance the court's comprehension of the case. The court refused to permit plaintiff's

expert to testify regarding the tests given to plaintiff on the grounds that such testimony would constitute "regrading" or "second-guessing" the grading of examiners from the Burmese Service. The court stated its view that nobody outside the Burmese Service of the V.O.A. at the time of the trial could qualify as an expert. This view, if accepted, would constitute discretion so absolute as to preclude any person litigating against the Burmese Service from ever having expert testimony at trial. The plaintiff is clearly entitled to introduce expert testimony to advance her case under Rule 704, Fed. R. Evid.

Plaintiff suffered because the trial judge's action was one-sided in permitting expert testimony from the government witnesses only. He was also pro-government in totally disregarding in his ruling and decisions all testimony and other evidence presented by plaintiff, including his failure to recognize

the prima facie case established by plaintiff passing the test at the marginal level.

The United States Attorney representing the defendants did everything possible to confuse the trial and appellated judges. She was determined to win her case, right or wrong, and was not interested in justice.

CONCLUSION

For reasons set forth above, the Court should exercise its power of supervision for the District Court and the Court of Appeals for the District of Columbia Circuit and grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Sheila A. Moats,
Petitioner
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(301) 299-8445

Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition has this date been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

December _____, 1985

Sheila A. Moats

A P P E N D I X

APPENDIX A-1

Judgment of the United States District Court for the District of Columbia from the bench, July 5, 1984 (tr. 157-8)

The court: Well, as must be apparent from some of the comments and questions we have made, particularly the comment with respect to Ms. Sullivan's motion at the close of the plaintiff's case, we are going to grant judgment for the defendants.

We think that the evidence is overwhelming that the plaintiff cannot meet one, and possibly more, of the tests that are set forth in the McDonnell-Douglas case. I think the evidence is overwhelming that she was examined, not once, but twice and later reevaluated and all eight of the people who evaluated her found that she was not acceptable.

I had some problems with the case originally because I thought if a person could speak

Burmese, they ought to be able to qualify as a Burmese broadcaster. But it is quite apparent from the testimony taken place, there is a great deal of difference between spoken Burmese and a translation of written English into written Burmese which is completely accurate.

As has been pointed out, a person could literally translate an article appearing in an American newspaper, translate that into Burmese and come up with a meaning and nuance that is completely inconsistent with the English as it appears.

As I indicated, we are going to grant judgment for the defendants. I think that it is too bad the plaintiff wasted as much time on this case as she apparently has. I had hoped in the past that there could be an accommodation, but there wasn't.

APPENDIX B-1

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5607 September Term, 1984

Sheila Moats CA No. 82-02667

v.

Charles Wick, Director, United States Information Agency, et al.

Filed September 5, 1985

George A. Fisher, Clerk

BEFORE: Ginsburg, Scalia and Starr, Circuit Judges

O R D E R

Upon consideration of appellee's Motion for Summary Affirmance, and the response thereto, it is

ORDERED by the court that the motion is granted, and the district court's July 5, 1984, judgment dismissing the complaint is affirmed.

This appeal presents a single, uncomplicated legal issue in an area in which the law

is well-developed, and it is apparent that further briefing and argument would not significantly aid the court. See United States v. Glover, 731 F.2d 41, 45 (D.C. Cir. 1984).

Appellant Moats contends, in the brief she dated June 25, 1985, that the district judge, at a bench trial, unduly limited the issues on which Moats's expert was permitted to testify. It is settled law, however, that the trial judge has considerable leeway "in the matter of admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." Salem v. United States Lines, 370 U.S. 31, 35 (1962).

The qualification of an expert to address particular issues and the assistance expert testimony might supply in advancing the court's comprehension of the case, see Fed. R. Evid. 702, are matters "largely committed to trial court discretion." Beins v. United States, 695 F.2d 591, 609 (D.C. Cir. 1982); see Engle v. Stull, 377 F.2d 930, 935 (D.C. Cir. 1967). The district judge in this case, our review

of the pertinent portions of the record reveals, reasonably determined that the expert Moats presented was not positioned to offer a useful opinion regarding appellant's 1978 examination or her qualifications at that time.

In sum, further protraction of this litigation would consume time and resources for all concerned without just cause. Settled law applied to the undisputed facts mandates affirmance. In the interest of the fair, expeditious, and not inordinately expensive administration of judicial business, we sustain the cogent disposition ordered by the district court.

The Clerk shall withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. See D.C. Cir. R. 14.

Per Curiam

APPENDIX C-1

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 84-5607 September Term, 1985

Sheila Moats CA No. 82-02667

v.

Charles Wick, Director,
United States Information
Agency, et al.

Filed Nov 5,1985
George A. Fisher, Clerk

BEFORE: Ginsburg, Scalia and Starr, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing and appellant's motion for leave to lodge exhibits, it is

ORDERED, by the Court, that appellant's motion for leave to lodge exhibits with the Court is denied, and it is

FURTHER ORDERED, by the Court, that the petition is denied.

APPENDIX C-2

Per Curiam

FOR THE COURT
GEORGE A FISHER, CLERK

BY: _____/s/
Robert A. Bonner
Chief Deputy Clerk